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No. 436

IN THE

# Supreme Court of the United States

October Term, 1962

STRACHAN SHIPPING COMPANY,

*Petitioner,*

—v.—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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### Opinions Below and Jurisdiction

The official reports of the opinions below and the jurisdictional requisites are adequately set forth in the Petition, page 2.

## Constitutional and Statutory Provisions Involved

The constitutional provisions[1] granting Congress and this Court "paramount power to fix and determine the maritime law", *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215, and the provisions of the Texas Workmen's Compensation Act, Article 8306, Section 3, Vernon's Annotated Civil Statutes, that: "The employees of a subscriber . . . shall have no right of action against their employer . . . for damages for personal injuries, . . . but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for."

## Question Presented

Should the Court grant the Petition in order to review the Court of Appeals' interlocutory determination that the Texas Workmen's Compensation Act does not and constitutionally cannot bar respondent Royal's maritime stevedoring contract indemnity claim for petitioner Strachan's breach of warranty of workmanlike service, there being no conflicting decisions and no other special and important reason for granting the Petition?

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[1] The provisions of Article I, Section 8, granting Congress power "To regulate commerce with foreign Nations, and among the several States" and "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States"; the provision of Article III, Section 2, extending federal judicial power "to all Cases of admiralty and maritime Jurisdiction"; the Article VI provision that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land".

## Statement

Rawlinson, a longshoreman employed by petitioner Strachan, a stevedore company, sued respondent Royal, a shipowner, to recover damages for injuries which Rawlinson sustained while on a Houston dock. Rawlinson alleged (R. 16-20) that he was struck by a length of pipe which was being loaded from the dock onto Royal's ship by means of a defective ship's winch operated by Rawlinson's fellow-employees.

Relying upon *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, Royal filed a third-party complaint against Strachan to recover indemnity for Strachan's breach of its implied contractual warranty to load the ship in a reasonably safe and workmanlike manner (R. 6-9).

After Royal settled Rawlinson's suit, Strachan moved for judgment dismissing Royal's third-party complaint, on the ground that the Texas Workmen's Compensation Act, which obligated Strachan to compensate Rawlinson for his injuries, barred Royal's maritime contract indemnity claim (R. 25-26).

In its opinion granting the motion (197 F. Supp. 201, Petition App'x. C, pp. 61-70), the District Court correctly assumed the applicability of federal substantive law (197 F. Supp., p. 204, Petition, p. 68), including the existence of the implied warranty by Strachan to perform its stevedoring services with reasonable care (197 F. Supp., pp. 202-203, Petition, pp. 64-65), and also properly assumed for purposes of the dilatory motion to dismiss the third-party complaint for failure to state a claim, cf., *Conley* v. *Gibson*, 355 U.S. 41, 45-46, that Strachan had breached its warranty of workmanlike service (197 F. Supp., p. 202, Petition, p. 63). The District Court also recognized that if Strachan's

breach of warranty had caused injury to Rawlinson on the ship, instead of on the dock, Royal could recover indemnity from Strachan on authority of *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp., supra,* and its "progeny" (197 F. Supp., pp. 202-203, Petition, pp. 64-65).

However, the District Court misconceived that *Ryan Stevedoring Co.* and later decisions of this Court[2] held that the stevedore's breach of implied warranty of workmanlike service is actionable in dockside injury cases only if the applicable state compensation act does not prevent third-party recovery (197 F. Supp., p. 203, Petition, pp. 65-66). The District Court observed that the *Ryan Stevedoring Co.* rationale, 350 U.S., p. 129, as to why the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., does not insulate stevedore company employers against liability to shipowners for breach of warranty of workmanlike service causing shipboard injuries is equally applicable to the Texas Workmen's Compensation Act (197 F. Supp., p. 203, Petition, p. 66), but the District Court nevertheless held that the Texas Act, as construed by Texas courts,[3] controls and "Texas says no" (197 F. Supp., pp. 203-204, Petition, pp. 66-67).

The Court of Appeals, Judge Cameron dissenting, reversed the District Court (301 F. 2d 741, Petition App'x. A, pp. 43-54), remanding the case for trial of Royal's indemnity claim, and denied Strachan's petition for rehearing (304 F. 2d 545, Petition App'x. B, pp. 55-60). The Circuit Court held that Royal's contract indemnity claim for Strachan's

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[2] *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Waterman Steamship Corp.* v. *Dugan & McNamara Corp.*, 364 U.S. 421.

[3] Citing: *West Texas Utilities Co.* v. *Renner*, Tex. Civ. App., 32 S.W. 2d 264, aff'd, 53 S.W. 2d 451; *Westfall* v. *Lorenzo Gin Co.*, Tex. Civ. App., 287 S.W. 2d 551; *McCormick* v. *U. S.*, S.D. Tex., 134 F. Supp. 243.

breach of implied warranty of workmanlike performance of its stevedoring contract is governed by federal maritime law, as judicially established in the *Ryan Stevedoring Co.* line of decisions (301 F. 2d, p. 743, Petition, pp. 44-45) and that the claim is not indirectly derived from the injured longshoreman's right to recovery (301 F. 2d, pp. 743, 746, 304 F. 2d, p. 547, Petition, pp. 45, 51, 57-59) and cannot be affected by state laws governing the longshoreman's rights and remedies (301 F. 2d, pp. 744, 746, 304 F. 2d, p. 548, Petition, pp. 47, 52, 59). The Court of Appeals further held that even if Texas could bar Royal's maritime contract claim, the Texas law does not do so (301 F. 2d, pp. 745-747, Petition, pp. 49-52).

In the course of its opinions, the Court of Appeals specifically refuted Strachan's contentions, renewed in its Petition, points I, III, and VI, that the decision below is in conflict with *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, (301 F. 2d, pp. 743-744, Petition, pp. 44-46), *Kent* v. *Shell Oil Co.*, 5 Cir., 286 F. 2d 746 (301 F. 2d, pp. 744, 746, 304 F. 2d, pp. 546-547, Petition, pp. 46-47, 52, 55-57), and the Texas cases (cited in footnote 3, *supra*) relied upon by the District Court and by Strachan (301 F. 2d, pp. 745-746, 304 F. 2d, pp. 547-548, Petition, pp. 50-52, 57-60).

## ARGUMENT

**The decision of the Court of Appeals below is correct and is not in conflict with any decision of this Court or of any other court, except that of the District Court below which was reversed.**

The Court of Appeals' decision, that the Texas Workmen's Compensation Act cannot constitutionally bar Royal's maritime contract indemnity claim for Strachan's breach of warranty of workmanlike stevedoring service, is entirely in accord with the implicit holdings in *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, recognized in such cases as *A/S J. Mowinckels* v. *Commercial Stevedoring Co.*, 2 Cir., 256 F. 2d 227, 230, appeal dismissed, 358 U.S. 801, and *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 2 Cir., 262 F. 2d 310, 313, that the enforceability of such contract indemnity claims is governed solely by federal maritime law. The Court of Appeals' decision is matched by *Revel* v. *American Export Lines*, E.D. Va., 162 F. Supp. 279, 284, affirmed, 266 F. 2d 82, 87, which held that the Virginia Workmen's Compensation Act (1950 Va. Code § 65-1, et seq.) does not bar a shipowner's indemnity claim for the stevedore company's breach of warranty of workmanlike service resulting in dockside injury to a longshoreman, and by *Hagans* v. *Ellerman & Buckhall Steamship Co.*, E.D. Pa., 196 F. Supp. 593, 597, which made an identical determination with respect to the inapplicability of the Pennsylvania Workmen's Compensation Act (77 Penn. Stat. §1, et seq.).

The Court of Appeals' decision recognized that:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any

substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409-410.

State law cannot constitutionally destroy a maritime contract claim. *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 312-314; *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741-742.

Strachan argues (Petition, p. 10, et seq.) that because Rawlinson's rights against Strachan under his maritime employment contract were supplemented by his right to compensation under the Texas Workmen's Compensation Act, Royal's rights against Strachan under its maritime stevedoring contract can be demolished by the Texas Act. This *non sequitur* is a variety of "destructive oversimplification" condemned in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373. Strachan urges (Petition, p. 19, et seq.) that the *Ryan Stevedoring Co.* holding that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., does not bar the shipowner's maritime contract indemnity claim against the stevedore, constitutes an implicit determination that a state workmen's compensation statute may bar such a claim. As the Court of Appeals stated (301 F. 2d, p. 744, Petition, p. 46), this *non sequitur* ignores the undoubted paramount federal authority to fix and determine the nature and extent of marine contract rights.

The decision below does not conflict with *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, as Strachan urges (Petition, point 1, p. 10, et seq.). *Wilburn Boat Co.* held that state law could invalidate warranties in a marine fire policy which might otherwise have precluded insurance recovery for loss of a houseboat. After ruling that, since the insurance policy was a maritime contract, 348 U.S., p. 313, state regulatory power was exercisable only "with

federal consent or acquiescence", 348 U.S., p. 314, the Court held that there was no "judicially established federal admiralty rule governing these warranties", *Ib.*, hence no possibility of federal-state conflict of laws,[4] and that it would be undesirable to fashion any such federal rule because of the traditionally strong policy favoring state regulation of insurance contracts.[5]

Here, by virtue of the *Ryan Stevedoring Co.* line of decisions, as the Court below recognized, "there can be no doubt that a clearly established federal judically-fashioned maritime rule governs a stevedore's breach of warranty to perform services in a workmanlike fashion" (301 F. 2d, p. 743, Petition, p. 45). Strachan contends that the shipowner's right to recover for the stevedore's breach of that warranty should vary from state to state and depending upon whether the breach caused shipboard or dockside injury. "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish . . . ." *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 217.

*Wilburn Boat Co.* also lacked a "genuinely salty flavor", *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 742, distinguished in Mr. Justice Frankfurter's concurring reference to the *Queen Mary*, 348 U.S., p. 323, and "some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma." *Kossick* v. *United Fruit Co., supra.*

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[4] This distinction was noted in *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 742.

[5] This distinction was emphasized in *A/S J. Mowinckels* v. *Commercial Stevedoring Co.*, 2 Cir., 256 F. 2d 227, 230-231, appeal dismissed, 358 U.S. 801.

The feebleness of the reasons advanced for granting the Petition is epitomized in the asserted conflicts with *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, *Swanson* v. *Marra Bros.*, 328 U.S. 1, *T. Smith & Son* v. *Taylor*, 276 U.S. 179, *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, and *Johnston* v. *Marshall*, 9 Cir., 128 F. 2d 13, cert. denied, 317 U.S. 629 (Petition, points I, II, V, pp. 10, 21, 34). *Romero* dealt with jurisdiction to entertain a foreign seaman's personal injury suit under the Jones Act (46 U.S.C. § 688) and general maritime law and did not in any manner involve the power of a state to destroy a maritime contract right. The other four cases held that a longshoreman's right to compensation from his employer for dockside injury is under the applicable state statute (which explains why Rawlinson got compensation from Strachan under the Texas Act). The decisions simply applied the maritime but local rule to a situation which Congress expressly left open to the states in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 903.

Strachan's irrelevant emphasis upon the fact that Rawlinson was injured on "land" (i.e. the dock) perpetuates its refusal to recognize that the basis of Royal's indemnity claim is breach of contract, not derivative tort.[6] That breach, incidentally, occurred on the ship, where Strachan's employees "did . . . bring into play" the allegedly defective winch. *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 429.

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[6] *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, *supra*, held that the shipowner's indemnity claim "is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee." 350 U.S., p. 131. *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, *supra*, cautioned that "sound judicial administration requires us to point out that in the area of contractual indemnity an application of the [tort] theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." 355 U.S., p. 569.

The "considered, relevant dictum of general scope" referred to in *Nolan* v. *Transocean Air Lines*, 365 U.S. 293, 296, was a recent California Supreme Court dictum on the exact question of California law at issue. The Court of Appeals did not fail to follow any such Texas dictum, as Strachan urges (Petition, point VI, p. 35, et seq.) because, as was emphasized below (301 F. 2d, pp. 745-746, Petition, pp. 49-52, 304 F. 2d, pp. 547-548, Petition, pp. 57-60), none of the Texas cases upon which Strachan relies[7] involved enforcement of a contract indemnity claim. Each of those non-maritime decisions concerned efforts to obtain equitable contribution or common law indemnity on tort theories of active/passive or primary/secondary negligence; theories which *Weyerhaeuser Steamship Co.*, *supra*, held "inappropriate" to a shipowner's indemnity claim for a stevedore's breach of warranty.[8]

The Court of Appeals was obliged to assume, as it did (304 F. 2d, pp. 547-548, Petition, p. 59) that:

> "If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties." *Kermarec* v. *C. G. T.*, 358 U.S. 625, 628.

A Texas court would be "bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245. In *Merriweather* v. *Boland & Cornelius*, 6 N.Y. 2d 417, a state court, faced

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[7] Cited in footnote 3, *supra*.

[8] As the Court of Appeals noted, 301 F. 2d, p. 746, Petition, pp. 51-52, third-party tort recovery is barred by the Longshoremen's and Harbor Workers' Compensation Act, *American Mutual Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322; *Crawford* v. *Pope & Talbot*, 3 Cir., 206 F. 2d 784; *Brown* v. *American-Hawaiian S.S. Co.*, 3 Cir., 211 F. 2d 16. *Ryan Stevedoring Co.*, *supra*, held these decisions "not applicable" to contract indemnity claims, 350 U.S., p. 133.

with the same constitutional question raised by Strachan's Petition, held that the shipowner's third-party complaint pleaded an enforceable contract indemnity claim under decisions of this Court, commencing with *Ryan Stevedoring Co., supra.*

Finally, the Court of Appeals' decision is not in conflict with that Court's opinion in *Kent* v. *Shell Oil Co.*, 5 Cir., 286 F. 2d 746 (printed in the Petition App'x. D, pp. 71-81), as Strachan contends (Petition, Point III, p. 25, et seq.). The Court below dealt with and rejected this argument (301 F. 2d, p. 744, 746, Petition, pp. 46-47, 304 F. 2d, pp. 546-547, Petition, pp. 55-57).

In *Kent*, a truckdriver sued to recover damages for personal injuries sustained on a Louisiana dock while helping unload pipe from a truck onto a barge by means of timbers or "skids". For some unexplained reason, the pipe unexpectedly rolled off the truck and struck the plaintiff. Two questions were presented in *Kent*: "the sufficiency of the proof of asserted unseaworthiness of the vessel" (i.e. of the "skids"), and "whether an assumed breach of such warranty extends to injuries sustained on shore by an employee of a third-party . . . under circumstances in which the Louisiana Compensation Act would insulate such vessel owner from third-party liability." (286 F. 2d, p. 748, Petition, p. 72.)

After sustaining the District Court's refusal to submit the unseaworthiness claim to the jury because it was "an afterthought" (286 F. 2d, p. 749, Petition, p. 74); holding that the skids were "not a part of the vessel or its appurtenances" (286 F. 2d, p. 752, Petition, p. 80) and hence could not be found unseaworthy; holding that there was no proof that the skids were not reasonably fit for their intended purpose (*Ib.*, Petition, pp. 80-81) and hence were unseaworthy; and holding that there was no "evidence

offered that any deficiency, even if assumed, was the cause of the injuries" (*Ib.*, Petition, p. 81), the Court stated that the Louisiana Workmen's Compensation Act (La. Rev. Stat., 23:1061) barred the injured employee's third-party action.

What was said in *Kent* about the Louisiana Act was pure dictum or, as the Court below put it, "an added ground for decision" (304 F. 2d, p. 546, Petition, p. 56). *Kent* involved the third-party rights of an employee who had already received compensation; not the third-party rights of a shipowner who had received no compensation but had been obliged to pay damages for the stevedore's breach of contract.[9] As the lower Court held, although "a state compensation act can bar an injured employee from suing a third-party. If, however, such a suit is permitted, and is pursued to final settlement, a state compensation act cannot prevent an action against the employer by the third party based on a federal judicially-established maritime contractual warranty." (301 F. 2d, p. 746, Petition, p. 52.)

The *Kent* dictum would appear consistent with the rule that: "when admiralty adopts a State's right of action . . . it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." *The Tungus* v. *Skovgaard*, 358 U.S. 588, 592. However, whether or not the *Kent* dictum is sound, it is abundantly clear that if there is any conflict between the decision below and *Kent*, "it is not a direct one". (304 F. 2d, p. 546, Petition, p. 56.)

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[9] The fact that Royal's maritime contract rights are involved "in itself creates some presumption in favor of applying that law tending toward the validation of the alleged contract." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741.

## II.

**There is no other special and important reason for granting the Petition.**

Strachan's argument (Petition, p. 21) that the decision below creates confusion by failing to observe the "clearly marked" "line of demarcation" between federal law governing injuries on navigable waters and state law governing injuries ashore is more "destructive oversimplification". Rights stemming from shoreside injuries are sometimes governed by federal law; for example, Rawlinson's rights against Royal. Conversely, rights stemming from injuries on navigable waters are sometimes governed by state law; for example, rights under state wrongful death statutes where longshoremen or passengers are killed aboard ships in local waters. The truth is, as stated in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216, that:

> "... it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."

Twilight zone cases, and the problem of separating truly maritime from maritime but local, have plagued this Court and others for more than a century. Although such cases will undoubtedly continue to arise, this is not one of them.

Strachan's suggestion (Petition, Point IV, p. 30, et seq.) that this Court should reach out to correct what appears to be a patently erroneous decision in another case which is pending for reargument in the Eastern District of Louisiana is too insubstantial to bear comment.

## CONCLUSION

**The Petition should be denied.**

Respectfully submitted,

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I certify that I have air mailed copies of this brief to E. D. Vickery, Esquire, of Messrs. Royston, Rayzor & Cook, counsel for petitioner herein, and to Henry D. Akin, Esquire, of Messrs. Leachman, Gardere, Akin & Porter, of counsel for petitioner.

WILLIAM M. KIMBALL

Dated: New York, New York,
October 16, 1962.